EDITOR'S NOTE

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SUPREME COURT OF THE UNITED STATES

RIVER ROAD ALLIANCE, INC., ET AL.
85–785 *v.*
CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.

ILLINOIS
85–800 *v.*
CORPS OF ENGINEERS OF THE UNITED STATES ARMY ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 85–785 AND 85–800. Decided March 3, 1986

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

In 1980, respondent National Marine Service applied to respondent Army Corps of Engineers for a permit to construct a temporary barge fleeting facility on the Mississippi River. After holding a public hearing on the environmental effects of the proposed facility, the Corps issued a brief "environmental assessment" concluding that the facility would have no significant environmental effects. Based on this conclusion, the Corps determined that it was not required to prepare an Environmental Impact Statement (EIS) on the proposed project, since such an EIS is required by the National Environmental Policy Act (NEPA), 42 U. S. C. § 4332(2)(C), only for projects that will "significantly affect . . . the quality of the human environment." Thus, the Corps issued the permit sought.

Petitioners, the State of Illinois and others including the River Road Alliance, Inc., brought suit in the United States District Court for the Southern District of Illinois, challenging the issuance of the permit and the Corps' underlying find-

ing of no significant environmental effects. On the petitioners' motion for summary judgment, the District Court found that "[w]hile paying lip service to [NEPA], the Corps has failed to take the 'hard look' required to support its conclusions, and has failed to document that 'hard look' in the Environmental Assessment . . . ." Appendix to Petition of State of Illinois, 33. Based on this conclusion, the District Court held that the Corps' action was arbitrary and capricious and entered judgment in favor of the petitioners.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed. While observing that that Court had previously held that an agency's decision not to prepare an EIS is reviewed only for an abuse of discretion, see, *e. g.*, *Wisconsin* v. *Weinberger*, 745 F. 2d 412, 417 (CA7 1984), the Court of Appeals in this case acknowledged that other Courts of Appeals have held that such decisions are reviewed for reasonableness. 764 F. 2d 445, 449. Having noted these differing formulations, the Court of Appeals expressed its doubt as to the "practical difference" between the two standards: "There is plenary review and there is deferential review, and whether it is fruitful to attempt fine gradations within the second category may be doubted, though there is no need to resolve our doubt here." *Ibid.* The Court then declined to substitute its judgment for the Corps' and reversed the decision of the District Court.

Although the precise contours of the Court of Appeals' review in this case are somewhat unclear, the decision below again presents to this Court the unresolved question of the standard of review to be applied by courts reviewing an agency decision not to prepare an EIS. I have noted before the divergent standards of review invoked by the various Courts of Appeals in this context, see *Gee* v. *Boyd*, —— U. S. ——, —— (1985) (WHITE, J., dissenting from denial of certiorari), and I will not again detail the alignment of the lower courts here. I reiterate, however, my previously-expressed view that "[t]his conflict is not merely semantic or ac-

ademic": The courts that invoke the abuse-of-discretion or arbitrary-and-capricious standard emphasize that the decision is committed to the agency's discretion and expertise; the courts that invoke the reasonableness standard, in contrast, stress the non-discretionary nature of NEPA's language. *Id.*, at ——. Because this conflict among the circuits raises a significant question as to the proper interpretation of a federal statute, because this question recurs regularly, and because I believe that the issue is not merely one of semantics, I would grant certiorari to resolve the issue.